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No. 06-____

IN THE

Supreme Court of the United States

SHERROD YOUNG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since this Court decided *United States v. Booker*, 543 U.S. 220 (2005), the courts of appeals have become fundamentally divided on the question whether a district court may consider, as one factor in determining a sentence, the sentencing disparity between crimes involving crack cocaine and those involving powder cocaine. The D.C. Circuit has held that a sentencing court may (indeed, should) consider that disparity when deciding whether the sentence is just and necessary under the provisions of 18 U.S.C. § 3553. Seven courts of appeals have held that a district court may not reject the crack cocaine sentencing ratio if it considers the disparity unjust, although four of those courts have held that a sentencing court may consider whether that disparity is appropriate light of the facts of the individual case, and not as a general policy matter. And two other courts of appeals have held that sentencing courts have no discretion at all to depart from the Guidelines ranges for crack cocaine crimes on the basis of the crack-powder sentencing disparity.

The question presented is whether a district court is prohibited from considering as a factor in selecting a sentence the 100:1 weight ratio disparity between crack and powder cocaine contained in the United States Sentencing Guidelines.

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Sherrod Young respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 12a) is unreported and available electronically at 2007 U.S. App. LEXIS 2641. The opinion of the United States District Court for the Middle District of Pennsylvania (App. 1a) was delivered from the bench in open court on November 2, 2005.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3553 of Title 18 provides in relevant part that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; [and] . . . the sentencing range . . . as set forth in the guidelines . . . issued by the Sentencing Commission pursuant to section 994(a)(l) of title 28, United States Code . . . ."

The drug quantity table contained in U.S.S.G. § 2D1.1(c) (Nov. 1, 2005) is set forth in the appendix (App 21a).

STATEMENT OF THE CASE

This case concerns the 100:1 "weight" ratio between crack and power cocaine used by the United States Sentencing Guidelines to set a sentencing range for drug offenses. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table). Commentators and the Commission have been in near unanimous agreement for over a decade that the 100:1 ratio has created a national drug-policy crisis. But because the 100:1 ratio has its roots in criminal statutes enacted by Congress, both the Commission and the lower courts were constrained before this Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), to follow that ratio.

Since this Court's decision in *Booker*, however, the lower courts have become fundamentally divided on the issue. To be clear, the question in this case is *not* whether a district court may depart from a mandatory minimum set by Congress, but rather whether a district court may consider as one factor in selecting a sentence the enormous disparity between crack- and power-cocaine sentences contained in the Guidelines themselves. Ten courts of appeals have addressed the question with profoundly divergent results. The Court of Appeals for the District of Columbia has expressly held that, because *Booker* renders the Guidelines advisory, a district court may consider the well-known problems associated with that disparity in selecting a sentence below the Guidelines range. And although nine courts of appeals have held that district courts may not categorically reject the sentencing ratios contained in the Guidelines, some of those courts have held that district courts *may* consider whether those ratios are appropriate in light of the facts of a particular case, whereas other courts have held that district courts may *never* take account of those ratios in any way.

This recurring issue warrants the Court's review. It impacts literally thousands of criminal sentences every year and

has a profound impact not only on the federal prison system but on urban communities throughout the nation.[1] It is, as the Government acknowledged approximately one week ago, "an issue of exceptional importance." Pet. for Reh'g at 6, *United States v. Pickett*, No. 05-3179 (D.C. Cir. filed Apr. 30, 2007).

Moreover, the majority of courts of appeals to have addressed the issue have, like the court below, reached the wrong result, and have sown confusion and frustration in the district courts. In particular, they have disregarded this Court's mandates in *Booker* that the Guidelines are advisory, and that, as a result, district courts have discretion to consider the gratuity or injustice of the Guidelines' sentences for crack cocaine in selecting a sentence.

This case presents an ideal vehicle for deciding the question presented. The Court of Appeals held that district courts lack authority to second-guess the 100:1 ratio in any way and that imposing a more "justified" sentence would "flout[] Congress' intent embodied in § 841 and the Commission's incorporation of this intent in the sentencing guidelines." (App. 17a.) The Court should therefore grant this petition. Alternatively, the Court should hold this petition until it issues decisions in *Rita v. United States*, 06-5754, 127 S. Ct.

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[1] *See* United States Sentencing Commission, Transcript of Public Hearing on Cocaine Sentencing Policy at 297 (Nov. 14, 2006) ("USSC, 2006 Public Hearing Tr.") (testimony of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center), *available at* http://www.ussc.gov/hearings/ 11_15_06/testimony.pdf; United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* at 131 (Nov. 2004) ("USSC, *Fifteen Years*"), *available at* http://www.ussc.gov/15_year/15year.htm; United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy at 1 (Feb. 1995) ("USSC 1995 Report"), *available at* http://www.ussc.gov/crack/exec.htm; H.R. Rep. No. 99-845 pt. I, at 11-12 (1986).

551 (2006), and *Claiborne v. United States*, No. 06-5618, 127 S. Ct. 551 (2006).

A. The Sentencing Guidelines.

1. Congress first implemented a crack/powder sentencing disparity as part of a mandatory minimums sentence scheme in the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841(b)). Congress established that minimum penalties would be triggered based on the quantities and types of drugs involved. That scheme required 100 times as much powder cocaine as crack cocaine to trigger the same length of sentence. *See* USSC 1995 Report at 1.

The Commission adopted the 100:1 ratio in its first edition of the Sentencing Guidelines issued in 1987, the sentencing provisions at issue in this petition. U.S.S.G. § 2D1.1 cmt. n. 10 (1987). The Commission stated that the ratio in the Guidelines was based solely on Congress's structure for mandatory minimum sentences. *Id.*

2. By 1994, the sentencing policy for crack cocaine was the subject of extensive criticism. *See* USSC, Special Report to the Congress: Cocaine and Federal Sentencing Policy at 1 (Apr. 1997) ("USSC 1997 Report"), *available at* http://www.ussc.gov/r_congress/newcrack.pdf. Congress responded by enacting a "safety-valve provision," which permitted courts to depart from mandatory minimum sentences if a defendant meet certain requirements. Pub. L. No. 103-322, tit. VIII, § 800001(a), 108 Stat. 1796, 1985-86 (1994) (codified at 18 U.S.C. § 3553(f)). Congress also directed the Commission to study federal sentencing policy on all forms of cocaine and report back to Congress whether the disparate penalties for crack and powder cocaine were appropriate. *See id.* § 280006, 108 Stat. at 2097.

In its ensuing 1995 Report, the Commission repudiated the sentencing distinction between crack cocaine and powder

cocaine. It cited several findings regarding the 100:1 quantity ratio, including that: (1) African Americans were bearing the brunt of the higher crack-cocaine sentences; (2) low-level street dealers selling crack cocaine were receiving far more severe sentences than high-level suppliers of powder cocaine; (3) the 100:1 ratio was disproportionate relative to the harms associated with each form of cocaine; and (4) the evils associated with crack cocaine were already accounted for through other sentencing enhancements, resulting in double punishment for crack-cocaine-related offenses. USSC 1995 Report at xii-xv. The Commission recommended equalizing the sentences for crack and powder cocaine. *See* USSC 1997 Report at 1.

Congress declined to enact the USSC's recommendations, but directed the Commission to further consider changes to the Guidelines as they applied to cocaine. Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995). In 1997 and 2002, the Commission again reported to Congress that the 100:1 ratio should be abandoned as unjust and unnecessary. *See* USSC, Report to the Congress: Cocaine and Federal Sentencing Policy at 91 (May 2002) ("USSC 2002 Report"), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; USSC 1997 Report at 9. In its 2002 report, the Commission "firmly and unanimously" expressed its belief "that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act." USSC 2002 Report at 91. The Commission concluded that the crack/powder ratio "greatly overstates" the comparative problems with crack cocaine. *Id.* at 93-100.[2]

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[2] Most recently, on May 1, 2007, the Commission again repeated its indictment of the vast cocaine sentencing disparity, describing the "problems associated with the 100-to-1 drug quantity ratio" as "urgent and compelling" and imploring Congress to act. USSC, Amendments to the

3. In 2005, this Court decided *United States v. Booker*, 543 U.S. 220 (2005). The Court issued its ruling in two opinions. In the first opinion, the Court held that the mandatory nature of the Sentencing Guidelines rendered them unconstitutional under the Sixth Amendment. *Id.* at 244. In the second opinion, the Court determined that the appropriate remedy required excising "the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1)." *Id.* at 245. The Court held that district courts must be free to impose any sentence under the statutory maximum based on a guilty plea or a jury verdict, using the Guidelines as a source of advisory guidance. The Court found that this remedy "would deviate less radically from Congress' intended system" than other possible solutions, *id.* at 247, although it acknowledged that the remedy would not "provide the uniformity that Congress originally sought to secure," *id.* at 263.

Following *Booker*, district courts are bound to impose sentences in accordance with 18 U.S.C. § 3553(a), which directs judges to "impose a sentence sufficient, but not greater than necessary, to comply with" a variety of factors, including the applicable Guidelines range, certain defendant-specific considerations, and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

B. Factual and Procedural History.

On February 10, 2001, a jury found Sherrod Young guilty of conspiracy to possess and to possess with intent to distribute in excess of 50 grams of crack cocaine and three

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Sentencing Guidelines at 46 (2007), *available at* http://www.ussc.gov/2007guid/finalamend07.pdf.

other substantive charges involving possession and possession with intent to deliver. The presentence report issued by the United States Probation Office stated that the amount of crack cocaine attributable to Mr. Young was between 500 grams and 1.5 kilograms. The Government subsequently stipulated that the maximum amount of crack cocaine attributable to Mr. Young was 150 to 500 grams, producing a Guidelines sentencing range of 324 months to 405 months. The court sentenced Mr. Young to 324 months imprisonment.

Mr. Young challenged his conviction and sentence in the Court of Appeals for the Third Circuit. The Third Circuit issued a non-precedential opinion denying Mr. Young's challenges to his conviction and, in light of this Court's intervening decision in *Booker*, vacating the sentence and remanding the case for resentencing.

On November 2, 2005, the District Court held a second sentencing hearing. (App. 1a.) Mr. Young's counsel requested that the court consider several mitigating issues and impose a sentence substantially below the Guidelines range. One of those issues was the unjustness of the disparity between the sentences recommended for crack and powder cocaine. Mr. Young's counsel asked that the court "take into consideration the literature and arguments that have been made that this disparity [between the sentences for crack cocaine and powder cocaine] does, to some extent, overstate the seriousness of the offense on an offense involving crack." (App. 3a.)

The court rejected Mr. Young's request to consider the fact of the sentencing disparity. Although the District Court acknowledged that it was free to depart from the Guidelines, the court held that it had no discretion to depart from the Guidelines range on the basis of the disparity between crack- and powder-cocaine sentences. (App. 7a-8a.) "Granted, that the guidelines were very harsh when we're dealing with

crack cocaine," said the court, "but that's what was intended by Congress, and I don't think that the Judges have a right to legislate, whether we agree or disagree, because that is basically not our role." (App. 8a.)

The Court of Appeals agreed with the District Court's ruling and affirmed Mr. Young's sentence. The court held that "[h]onoring Young's request of an even lower sentence based on a more 'justified' ratio would have flouted Congress' intent embodied in § 841 *and the Commission's incorporation of this intent in the sentencing guidelines*." (App. 17a (emphasis added).) The court noted that other circuit courts have reached the same conclusion that sentencing courts may not craft their own ratio as a substitute for the 100:1 ratio chosen by Congress. (App. 18a.)

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve a disagreement among the courts of appeals over whether district courts may depart from the Sentencing Guidelines on the basis that the exceptionally high sentences for crack-cocaine-related crimes compared to those for crimes involving powder cocaine are unjustified and unnecessary to serve the purposes described in Section 3553. The Court should resolve this important issue affecting literally thousands of federal sentences.

The decision of the Court of Appeals conflicts with this Court's decision in *Booker* by making the Guidelines mandatory in some situations, but not in others, depending on the reasons provided by the sentencing court to justify the sentence. The decision of the Court of Appeals also wrongly denies judges the sentencing discretion granted to them under federal statute to consider the seriousness of the offense, the need for deterrence of future crimes, and the justness of the sentence. The Court should grant the petition.

I. THE COURT SHOULD RESOLVE A FUNDAMENTAL DISAGREEMENT AMONG THE COURTS OF APPEALS ON AN IMPORTANT QUESTION.

The Court should grant review because the ten courts of appeals that have addressed the question whether a sentencing court may depart from the advisory Guideline sentences for crack have reached fundamentally conflicting conclusions.[3]

On one hand, the Court of Appeals for the District of Columbia has expressly held that *Booker* requires district judges "to evaluate how well the applicable Guideline effectuates the purposes of sentencing enumerated in § 3553(a)" without affording the Guidelines undue weight. *United States v. Pickett*, 475 F.3d 1347, 1353 (D.C. Cir. 2007). Under this approach, the D.C. Circuit found that several policy considerations weigh against the application of Guideline sentences for crack. It noted first that the Commission is one of the "severest critics" of the crack/powder disparity. *Id.* It cited the Commission's finding that the 100:1 ratio "threatens 'public confidence in the federal courts' because it has had a disproportionate effect on African-American offenders." *Id.* at 1354 (quoting USSC, *Fifteen Years* at 131, 135). It concluded that the Commission itself believes that the crack sentencing Guideline "generates sentences that are

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[3] The only remaining courts of appeals — the Sixth Circuit and the Ninth Circuit — have not reached the question presented by this petition and are unlikely to do so until this Court reaches a decision in *Claiborne v. United States*, No. 06-5618, and *Rita v. United States*, No. 06-5754. *See United States v. Husein*, 478 F.3d 318, 340 (6th Cir. 2007) (noting Sixth Circuit is holding related cases in abeyance until *Claiborne* and *Rita* are decided); *United States v. Carty*, No. 05-10200 (9th Cir. Dec. 6, 2006) (en banc) (same). For the reasons elaborated in Part III, *infra*, the Court's holdings in *Claiborne* and *Rita* may bear on the disposition of this petition.

'greater than necessary,' exaggerates 'the seriousness of the offense' of crack trafficking, does not 'promote respect for the law,' and does not 'provide just punishment for the offense.'" *Id.* (citing 18 U.S.C. § 3553(a), (a)(2)(A)). The Court found that departing from the Guidelines would not frustrate the will of Congress because Congress's will is set forth in statutory maximums and minimums, not the Guidelines. *Id.* at 1355. And it concluded that any disparity in sentencing that policy-based departures from the Guidelines might produce "is a consequence of the Supreme Court's decision to treat the Guidelines as advisory rather than mandatory." *Id.* at 1356. It thus reversed the district court in *Pickett* because it "refused to consider the problems that arise from applying the Guideline in crack cases." *Id.*[4]

On the other hand, nine circuits — including the Third Circuit in this case — have concluded that a sentencing court cannot consider a categorical disagreement with the crack/powder sentencing disparity as a factor in a proper Section 3553 analysis. *See United States v. Pho*, 433 F.3d 53 (1st Cir. 2006) (reversing district court's decision to sentence according to a 20:1 ratio); *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006) (same); *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006) (reversing district court's decision to impose statutory minimum sentences); *United States v. Leatch*, No. 06-10526, 2007 U.S. App. LEXIS 6619 (5th Cir. Mar. 22, 2007) (reversing 20:1 ratio); *United States v. Jointer*, 457 F.3d 682 (7th Cir. 2006) (same); *United States v. Spears*, 469

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[4] Though the Sixth Circuit has not actually reached the question whether a trial court can depart from a Guideline crack sentence on the basis of a policy disagreement with the crack/powder disparity, it has affirmed a trial court's consideration (and rejection) of a defendant's disparity argument as consistent with the multifactor analysis required under Section 3553(a). The court's holding both implicitly allowed for departures and suggested that failing to account for the disparity could render a sentence unreasonable — consistent with *Pickett*. *See United States v. Gardner*, No. 06-1006, 2007 WL 205557, at *2 (6th Cir. Jan. 25, 2007).

F.3d 1166 (8th Cir. 2006) (en banc) (same); *United States v. Aaron Williams*, 456 F.3d 1353 (11th Cir. 2006) (reversing district court's decision to depart from Guideline in part because of "concern about the discrepancy between powder and crack cocaine"); *see also United States v. McCullough*, 457 F.3d 1150, 1172 (10th Cir. 2006) (affirming district court's refusal to depart based on sentencing disparity and suggesting it would be error to depart based on "disagreement with the crack cocaine/power cocaine disparity"); *see also United States v. Miller*, No. 04-10133-01, 2007 U.S. Dist. LEXIS 14716, at *14 (D. Kan. Feb. 27, 2007) (construing *McCullough* to bar sentencing departures based on disagreement with crack/powder sentencing disparity). Petitions for writs of certiorari to the courts of appeals are currently pending before this Court in a number of these cases.[5]

But these nine courts of appeals are not remotely unified in their approach, and the issue is far more divisive than an ordinary 9-1 split. Some of those nine courts of appeals only bar a "categorical" rejection of the 100:1 crack/powder disparity enshrined in the Guidelines. *E.g.*, *United States v. Young*, No. 05-5032, 2007 U.S. App. LEXIS 2641, at *7 ("In [*United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006)], we held that 'district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process.'"). The First, Third, Seventh, and Eleventh Circuits appear to fall in this camp. *See id.*; *Pho*, 433 F.3d at 65; *Jointer*, 457 F.3d at 687-88; *Aaron Williams*, 456 F.3d at 1369.

Other courts of appeals have gone further and reversed even those district courts that have departed from the 100:1

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[5] *See Eura v. United States*, No. 05-11659, filed June 20, 2006; *Jointer v. United States*, No. 06-7600, filed Oct. 27, 2006; *Spears v. United States*, No. 06-9864, filed Mar. 2, 2007; *Aaron Williams v. United States*, No. 06-7352, filed Oct. 19, 2006.

ratio based on the *specific circumstances* of the defendant's case. *E.g.*, *Eura*, 440 F.3d at 631 (district court thought it "appropriate to consider this matter as an individual matter, not as a wholesale objection or acceptance of the guidelines"). The Fourth and Eighth Circuits appear to fall in this camp. *See id.*; *United States v. Johnson*, 474 F.3d 515, 522 (8th Cir. 2007) (affirming district court that refused to "take into account" the crack/powder disparity in setting a sentence).[6]

This secondary split between the individual-departure camp and the no-departure camp has led to concern and confusion among judges and prosecutors across the nation about whether and how the crack/powder sentencing disparity may be appropriately considered. Individual-departure advocates would permit consideration, for example, of the Commission's findings concerning the propriety of the crack/powder disparity "insofar as they are *refracted through* an individual defendant's case." *Eura*, 440 F.3d at 637 (Michael, J., concurring in the judgment and concurring in part). But in practice, a genuine refraction has proven difficult to distinguish from a categorical rejection disguised in refractive clothing. In the Eleventh Circuit, for example, the Government complained in one crack sentencing case affirmed on appeal that the "district court merely 'incanted' the § 3553(a) sentencing factors and chose to ignore them," *United States v. Marcus Williams*, 435 F.3d 1350, 1354 (11th Cir. 2006). Likewise, as Judge Barkett noted in her dissent from denial of rehearing in *Aaron Williams*, the individual-departure rule fol-

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[6] The Second Circuit's position is unclear; *Castillo* did not suggest that a district court could consider the disparity as it figured into an individual case, but a recent case allowed for such a possibility even while rejecting the defendant's argument that the district court had not reduced his sentence based on a categorical disagreement with the guidelines. *See United States v. Smith*, No. 05-2726-cr, 2007 U.S. App. LEXIS 6541, at *2-4 (2d Cir. Mar. 19, 2007).

lowed in *Marcus Williams* "has the perverse effect of discouraging district court judges from stating the reasons for imposing the sentence — the less they say, the less that can be used to reverse them," *United States v. Aaron Williams*, 472 F.3d 835, 847 (11th Cir. 2006) (Barkett, J., dissenting from the denial of rehearing en banc).

The district courts have similarly struggled to make sense of these rules. On remand from the Eleventh Circuit, Judge Presnell asked,

> "So what am I to do? . . . Am I to (somehow) ignore the widely held belief that the crack-powder disparity is inherently unjust; or may I subconsciously consider it in relationship to the offense conduct so long as it does not overwhelm my subjective judgment? . . . Should I . . . subvert my own sense of justice in order to purify my consideration of the statutory factors? Is that even humanly possible?"

United States v. Aaron Williams, No. 6:04-cr-111, 2007 U.S. Dist. LEXIS 14303, at *9-10 (M.D. Fla. Mar. 1, 2007). Similarly, on remand in *Castillo*, Judge Sweet acknowledged that he could no longer figure the crack/powder distinction into his analysis, but he concluded that "just as an 87-month sentence was determined to be sufficient but not greater than necessary to comply with § 3553(a)(2) in May 2005, so it still is today." *United States v. Castillo*, No. 03-Cr.-835, 2007 U.S. Dist. LEXIS 7422, at *23 (S.D.N.Y. Jan. 25, 2007). Judge Sweet altered the sentence a month later to "comply with the Second Circuit's opinion," extending it to 111 months, but only after noting that his initial determination that "an 87-month sentence was sufficient but not greater than necessary to comply with § 3553(a)(2)" "still holds." *United States v. Castillo*, No. 03-Cr.-835, 2007 WL 582749, at *8 (S.D.N.Y. Feb. 26, 2007).

Other district courts have also registered their doubts about whether a practical distinction exists between the individual-departure and no-departure camp, echoing those expressed in the *Williams* cases in the Eleventh Circuit. "The First Circuit did leave open the possibility of imposing a non-Guidelines sentence 'grounded in case-specific considerations,'" Judge Young acknowledged in one case. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 293 (D. Mass. 2006) (quoting *Pho*, 433 F.3d at 65). "Upon examining the hundreds of pages constituting the Guidelines, however, there are few factors that remain case-specific . . . . The Guidelines state that . . . deviations are warranted only in 'exceptional' cases . . . ." *Id.* (quoting U.S.S.G. § 5K2.0(a)(2)-(4)).

This Court's intervention will provide much needed guidance to defense counsel, prosecutors, and judges in applying the advisory sentencing scheme in crack-cocaine cases, and it is needed to cure a deep and increasingly complicated circuit split over the proper application of policy-level considerations in post-*Booker* sentencing. There is no question that the courts are looking to this Court for guidance in this area. "Respectfully, appellate guidance concerning when it is permissible for a sentencing court to deviate from the suggested Guideline range, based on what facts, is mind-numbingly incoherent. The First Circuit is not necessarily to blame; Remedial *Booker*, though, certainly is." *Kandirakis*, 441 F. Supp. 2d at 293.

II. THE DECISION BELOW WRONGLY RESTRICTS THE DISCRETION OF DISTRICT JUDGES TO SENTENCE CRIMINAL DEFENDANTS.

The Court should also grant review because the decision of the Court of Appeals is at odds with this Court's opinion in *Booker*. Although a sentencing court is still bound by the minimum and maximum sentences established by Congress, *Booker* renders the Sentencing Guidelines advisory. The de-

cision of the Court of Appeals wrongly attempts to revive the mandate of the Guidelines for particular reasons. This ignores that the Guidelines are an advisory scheme to which district courts are not bound, not even on the basis of the particular policy justifications for the crack cocaine sentencing disparity. The decision of the Court of Appeals also intrudes on district judges' discretion to consider all of the elements set forth under 18 U.S.C. § 3553 in fashioning an appropriate sentence. Congress has directed sentencing courts to consider the multiple factors outlined in Section 3553, and the courts should not prohibit themselves from conducting a full and proper examination of those factors, including the justness of the crack- and powder-cocaine sentencing disparity.

A. The Decision of the Court of Appeals Violates this Court's Decision in *Booker* that the Guidelines Are Rendered Advisory in Order To Comply with the Sixth Amendment.

By prohibiting sentencing judges from departing from the Guidelines for particular reasons, the decision of the Court of Appeals violates this Court's instruction in *Booker* that the Guidelines are advisory. *See Booker*, 543 U.S. at 258-60. The District Court believed it could not depart from that sentence based on the excessiveness of sentences for crack cocaine. When the Court of Appeals affirmed that decision, it held that the Guidelines are advisory, but only for certain justifications for departure, in effect expanding the statutory "safety valve," but ignoring this Court's mandate that the Guidelines are advisory. Contrary to the court's decision, sentencing courts may not treat the Guidelines as mandatory for some purposes, but not for others.

District courts are also required to follow the dictates of 18 U.S.C. § 3553. That statute requires a sentencing court to take several factors into account, including the appropriate Guidelines sentencing range based on the factors found by the court. *Id.* § 3553(a)(4). After *Booker*, however, a district

court is not bound to impose a sentence within a particular guideline range. "So modified, the federal sentencing statute makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentences in light of other statutory concerns as well." *Booker*, 543 U.S. at 245-46 (internal citations omitted).

Courts do not frustrate the will of Congress by departing from the Guidelines on the basis of fairness and policy considerations. The District Court and Court of Appeals in this case both stated that a departure on the basis of the impropriety of the cocaine disparity would frustrate the will of Congress expressed in the Guidelines. For Mr. Young, convicted of distributing more than 50 grams of crack cocaine, Congress has expressed its will that his sentence be between ten years' and life imprisonment. 21 U.S.C. § 841(b)(1)(A)(iii). However, Congress has not indicated where within a particular statutory range that sentence should fall. The only other indication as to Congress's intent is the Guidelines, but those are now advisory.

Because the Guidelines are advisory, courts do not flout the instructions of Congress by taking into consideration, but then departing from, a suggested range of sentences. The Guidelines are recommendations, not requirements. "It is therefore inconsistent with *Booker* to hold district courts must follow congressional advice, or policy, when it is given within the context of an advisory system." *Spears*, 469 F.3d at 1179 (Bye, J., dissenting). Therefore, so long as the district court takes into account the factors described in Section 3553, including the policy advice of Congress or the Commission, a district court may reject that advice so long as it provides a reasoned decision for its choice. District courts must be free to set a proper sentence for *Booker*'s solution to work, even if that means that they are free, under some circumstances, to reach policy conclusions on their own.

B. The Decision of the Court of Appeals Disregards the Instruction in 18 U.S.C. § 3553 to Consider a Broad Array of Factors in Sentencing by Giving Undue Weight to the Advisory Guidelines.

Federal statutory law requires district courts to consider several factors when sentencing a particular defendant, including the seriousness of the offense, the need to promote respect for the law, and the need to provide just punishment for the offense. 18 U.S.C. § 3553(a)(2)(A). District courts must still consider the advisory Guidelines range as one of those several factors. *Id.* § 3553(a)(4). However, courts are also required to consider the remaining factors. By limiting the factors a sentencing court may consider as part of this evaluation, the decision of the Court of Appeals conflicts with the explicit directives of Congress.

Several courts have argued that the Section 3553 factors are limited to the specific circumstances of the defendant and his crime and do not include questions of general policy or fairness. *See Leatch*, 2007 U.S. App. LEXIS 6619, at *4-5; *Castillo*, 460 F.3d at 337; *Eura*, 440 F.3d at 634. But Section 3553 cannot be so limited; otherwise, several factors in Section 3553 would be superfluous. Section 3553(a)(1) specifies, for example, that district courts are to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Section 3553(a)(2)(A) — which requires a district court to craft a sentence that fits the crime — would have no independent meaning if that directive did not require some policy consideration independent from what is already accounted for in Section 3553(a)(1). Those two provisions would be identical and redundant. The Court should avoid any such interpretation of Section 3553 that "renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995); *see also United States v. Alaska*, 521 U.S. 1, 59 (1997).

In addition, the broad factors in Section 3553(a)(2)(A) cannot be interpreted to mean the seriousness of the offense as already taken into account in the calculation of the guidelines range. Again, such an interpretation would render another factor in Section 3553 redundant, as the Guidelines range must be considered by the district court as well. 18 U.S.C. § 3553(a)(4). To give Section 3553(a)(2)(A) any independent meaning, the Court must interpret it to require district courts to evaluate the seriousness of and the just punishment for the general category of offense committed, separate from evaluating the case-specific circumstances under Section 3553(a)(1) or the guideline range under Section 3553(a)(4). "Such an evaluation is the essence of judging, not legislating." *Spears*, 469 F.3d at 1181 (Bye, J., concurring in part and dissenting in part).

Each of these factors, of course, (including the advisory Guidelines) must be considered in light of Section 3553's overarching policy directive: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). That directive — unlike the Guidelines themselves — is still mandatory. Any argument that the Guidelines necessarily represent what is "sufficient, but not greater than necessary" must fail, lest the Guidelines become effective mandatory. Thus, contrary to the conclusion of the court of appeals, this directive "supports — arguably even requires — a district court's decision not to follow the crack guidelines" in light of the USSC's findings about the policy justifications for the crack/powder sentencing disparity. Douglas A. Berman, *Crack Sentencing and the Anti-Parsimony Pandemic*, Sentencing Law & Policy, June 24, 2006, *at* http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/crack_sentencin.html. District courts do not frustrate the will of Congress by taking into consideration new facts and evolving circumstances that have devel-

oped since the Guidelines were imposed in 1986. *See, e.g.*, USSC 1995 Report, USSC 1997 Report, USSC 2002 Report. Furthermore, even if this Court were to decide as a general matter that it is consistent with *Booker* to require a presumptive deference by district courts to the Guidelines, "the normative foundations for such solicitude are shaky with respect to . . . the powder/crack disparity in particular." Note, *Criminal Law — Federal Sentencing Guidelines*, 120 Harv. L. Rev. 2004, 2010 (forthcoming 2007).

District courts do not usurp the role of Congress to legislate by departing from the Guidelines range on the basis of the unjustness of the sentencing disparity. Congress has mandated that the courts make just such a policy judgment based on the seriousness of the offense, the need to promote respect for the law, and the need to provide just punishment for the offense. *See* 18 U.S.C. § 3553(a)(2)(A). Thus, a "district court must consider its own evaluation of the seriousness of a given type of offense." *Spears*, 469 F.3d at 1181 (Bye, J., concurring in part and dissenting in part). In light of the Commission's conclusion that the beliefs underlying the imposition of the sentencing disparity in 1986 are, in fact, unsupported by its research and its study of actual federal drug sentences, district courts act well within their reasoned discretion to consider the unwarranted cocaine sentencing disparity when imposing a sentence pursuant to Section 3553.

C. The Unintended Consequences of the Cocaine Sentencing Disparity are Relevant to the Factors that Sentencing Courts Must Consider Under Section 3553.

District courts are required to consider the seriousness of and provide a just punishment for every offense and are thus within their discretion to consider whether the cocaine sentencing disparity actually achieves these aims when that disparity has been roundly refuted as unfounded. Long before

Booker, courts and commentators alike had acknowledged that crack sentences are often contrary to rational federal sentencing and drug policy. After *Booker*, a district court may conclude that the Guidelines produce unduly severe sentences even in cases involving low-level, non-violent, and first-time offenders.

Proof that the 100:1 ratio results in unduly severe sentences may be adduced by measuring the results of its use against Congress's stated goals. The Anti Drug Abuse Act of 1986 was intended to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'" H.R. Rep. No. 99-845, pt. I, at 11-12 (1986); *see also* William Spade, Jr., *Beyond the 100:1 Rationale: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252-53 (1996) ("The decision to distinguish crack from powder [in the Act] coincided with the decision to punish 'serious' and 'major' traffickers more severely than others .... 'Serious' and 'major' drug traffickers were identified according to the amount of drugs with which they were apprehended."). But the prosecution of crack offenders has followed *precisely* the opposite course over time. *See* USSC, 2006 Public Hearing Tr. at 40-41 (testimony of Joseph Rannazzisi, Drug Enforcement Administration) (describing small-scale nature of crack cocaine operations generally and specifically noting that most operations involve only small numbers of ounces). The brunt of prosecution falls upon the least serious offenders. *See* USSC 2002 Report at 39 (noting that, in 2000, approximately 73% of convicted crack cocaine offenders were "street-level" dealers, users, and the like, while only about 21% of defendants were mid-level offenders, such as importers, suppliers, or managers, and less than 6% were the highest-level offenders). These often first-time offenders garner the larger share of the long prison sentences Congress thought it was setting aside for the major dealers.

Even the suppliers apprehended are often able to flip Congress's design on its head. On average, *low*-level crack cocaine *users* receive longer sentences than *high*-level powder cocaine importers — the very *suppliers* who provide the powder cocaine which ultimately produces crack cocaine. *See* USSC 2002 Report at 63 (average sentence of lowest-level crack cocaine offenders was 104 months); *id.* at 43, 45 (average sentence of highest-level powder cocaine traffickers was 101 months). On a gram-by-gram basis, street level crack dealers are punished 300 times more severely than high-level cocaine powder importers. Eric E. Sterling, *Getting Justice Off Its Junk Food Diet*, White Paper (July 17, 2006), at 4, *available at* http://www.cjpf.org/Getting_Justice_Off_Its_Junk_Food_Diet.pdf.

A vastly disproportionate number of those incarcerated low-level drug offenders are African-American. "The number of black federal crack defendants is ten times the number of white defendants." *Id.* at summary. "In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African American."[7] USSC, *Fifteen Years* at 131. So disproportionate is the racial disparity in the case of crack that it is responsible in significant part for the enormous racial gap in sentences being served by black and white inmates in the federal penal system. Raising the crack cocaine threshold from 5 grams to 25 grams alone would "reduce the gap in average prison sentences between Black and White offenders by 9.2 months." *Id.* at 132. The existing problem is so severe that commentators have labeled the federal crack/powder disparity the "new Jim Crow" law. Social Justice and the War on Drugs (morning panel II), Tr. (Oct. 4, 2000) (statements of Hon. Robert Sweet and former Baltimore mayor Kurt Schmoke), *available at* http://

[7] The strong racial correlation of federal crack defendants exists despite the fact that "whites comprise a majority of crack users." Marc Mauer, *Race to Incarcerate* 172 (2d ed. 2006).

www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html.

Against the catastrophic nature of these problems, the original justifications for the 100:1 ratio do not survive two decades' worth of careful scrutiny. The most often cited rationale for the 100:1 ratio is the false perception that there are tangible differences between the two substances. *See, e.g.*, 132 Cong. Rec. 26,447 (1986) (statement of Sen. Chiles) (stating that disparate "treatment is absolutely essential because of the especially lethal characteristics of this [crack] form of cocaine"). But this tired contention can no longer be taken seriously. "[T]he pharmacological effects of cocaine are the same, regardless of whether it is in the form of cocaine hydrochloride [powder] or crack cocaine, the base." USSC, 2006 Public Hearing Tr. at 166 (testimony of Dr. Nora D. Volkow, Director, Nat'l Inst. on Drug Abuse, Nat'l Institutes of Health, U.S. Dept. of Health & Human Servs.). The Commission itself does not believe that differential treatment cannot be justified based upon this alleged difference. *See* USSC, *Fifteen Years* at 132.

It was also once believed that crack cocaine is uniquely correlated to more serious crimes. *See* USSC 1995 Report at 118-19 (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs"). Today, however, this theory too has been debunked as myth. "More recent data indicate that significantly less trafficking-related violence or systemic violence . . . is associated with crack cocaine trafficking offenses than previously assumed." USSC 2002 Report at 100 (for example, in 2000, only 2.3% of crack cocaine offenders used a weapon).[8] And as outlined

[8] In any event, district courts will, of course, impose higher penalties in cases involving violence, regardless of the type of drug at issue in the underlying offense. *See, e.g.*, U.S.S.G. §§ 2D1.1(b)(1), 2K2.1(b)(6) (weapons enhancements).

above, the unique perversity of the 100:1 ratio obtains in its lengthier sentences for low-level crack users than for the very high-level powder cocaine dealers who supply the drugs needed to convert powder cocaine into crack cocaine. The "serious" traffickers, committing the serious crimes, are prosecuted less frequently and spend less time in jail.

Therefore, powerful arguments support the conclusion that the sentencing disparity in the Guidelines does not achieve — and in fact hinders — the sentencing regime Congress intended to construct. Accordingly, trial courts act appropriately when considering whether the disparity produces a just sentence and the minimum sentence necessary, as required by Section 3553.

III. ALTERNATIVELY, THE COURT SHOULD HOLD THIS PETITION IN ABEYANCE UNTIL IT RESOLVES THE QUESTIONS PRESENTED IN RITA V. UNITED STATES AND CLAIBORNE V. UNITED STATES.

At a minimum, and as an alternative to plenary review, the Court should consider holding this petition until the Court issues decisions in *Rita v. United States*, 06-5754, 127 S. Ct. 551 (2006), and *Claiborne v. United States*, No. 06-5618, 127 S. Ct. 551 (2006). The Court's decisions in those cases may impact its resolutions of the questions raised in this petition.

Rita and *Claiborne* present the questions whether appellate courts make the Sentencing Guidelines effectively mandatory by granting a presumption of reasonableness to the Guidelines range and whether granting a presumption of reasonableness to the Guidelines range denies the substantial deference granted a district court's discretionary sentencing decision under the "reasonableness" standard described in *Booker*. Thus, it is possible that, in reaching a decision in *Rita* and *Claiborne*, the Court will determine what a sentenc-

ing court may consider in reaching a "reasonable" sentence pursuant to the factors described in Section 3553.

Accordingly, the Court should, at a minimum, hold this petition pending its decisions in *Rita* and *Claiborne*.

CONCLUSION

For the foregoing reasons, the petition should be granted or, in the alternative, held pending the Court's decisions in *Rita v. United States* and *Claiborne v. United States*.

Respectfully submitted,

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May 4, 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	01-CR-401
SHERROD YOUNG,	)	
Defendant	)	

BEFORE: HONORABLE EDWIN M. KOSIK
United States District Judge
for the Middle District of Pennsylvania

Re-sentencing

Wednesday, November 2, 2005
Scranton, Pennsylvania

APPEARANCES:

For The Government: CHRISTOPHER H. CASEY, ESQ.
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For Defendant: JOSEPH A. O'BRIEN, ESQ.
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MR. CASEY: Good morning, Your Honor.

THE COURT: Good morning.

MR. CASEY: Your Honor, we're here this morning on the case of United States of America v. Sherrod Young, case number is 3:CR-01-401. Mr. Young is here with his attorney Joseph O'Brien for re-sentencing.

He was convicted at trial. Following that, he was sentenced by the Court to a term of 324 months, pursuant to the Sentencing Guidelines. Since that time, the Supreme Court issued the case in United States v. Booker, and the Third Circuit has remanded the case on the question of re-sentencing, in light of the Booker case.

The Government is ready to proceed. There's been nothing filed by either the defense or the Government, but we're prepared to make oral argument today.

THE COURT: Okay. Let the record reflect that we're aware of the remand and the reasons for the remand in this case, and I'm prepared to proceed, but I invite counsel for the Defendant and the Defendant for any remarks they wish to make, and then we'll ask the Government for their response.

MR. O'BRIEN: Yes, Your Honor. Thank you for the opportunity to speak. Your Honor, we're here today to ask the Court to consider reducing substantially the sentence that was previously imposed on Mr. Young. The sentence the Court imposed was the minimum of the guidelines at a time where the belief was that the guidelines were mandatory. We would ask the Court to consider a number of factors.

Number one, the seriousness of the offense. Now, this, of course, is a very serious offense, and we understand

that Mr. Young has been and is going to be sentenced to a substantial term of imprisonment. We would ask the Court, however, to consider the fact that he did not commit any acts of violence, he did not hurt any other people, and, also, that the Court to, at least, give some consideration to the crack, powder cocaine issue.

I understand the Court's reluctance to completely reject the guideline that has been approved by executive, judicial and legislative branches of Government plus by the Sentencing Commission, but we would ask the Court to, at least, take into consideration the literature and arguments that have been made that this disparity does, to some extent, overstate the seriousness of the offense on an offense involving crack. We don't ask the Court to ignore the guidelines, I'm not asking the Court to write its own guideline, but as it considers the guideline, to take into account those arguments that have been made many times.

Your Honor, also, on the issue of deterrence, we would ask the Court to consider that this is Mr. Young's first offense, he had no prior criminal record, never been involved with problems with the law, before. He's an adult, he's in his 30's, had a good past, and I think that a sentence needed to deter him from future conduct would be substantially less than the one that the Court previously imposed. I had the occasion -- I stayed in contact with Mr. Young since his sentencing here, through his appeal. I went up to Otisville, New York last week, spent a couple hours with him, I have talked to him on the phone a number of times in the last two years, I've written back and forth to him 25 times, probably.

I visited with him two hours at Otisville last week to discuss the upcoming proceedings, and I could say that I think there has been a change in him, I think he understands what he did was wrong, he acknowledges his responsibility,

and he is ready to turn the corner in his life. So, Your Honor, I would ask the Court to consider those factors, when it decides what type of sentence is needed, both to deter him and to protect the public from future crimes.

Also, Your Honor, on the issue of rehabilitation, he received a long sentence and he's going to get a long sentence, and he's on the road to rehabilitation, I can tell from our meeting, the meeting that we had at Otisville that his interests now -- he's looking to the future, he's looking to getting back to helping provide for his children, he has four children, one an adult and three not adults, and that's what he's interested in now and that was what he's talking about, he's talking about putting his past behind him. No longer is he angry at the system and blaming others, I think he is in the process of being rehabilitated, and so we would ask the Court to consider that.

I would also ask the Court to consider the remarks he makes in support of this request.

THE DEFENDANT: I would like to say, Your Honor, I'm very sorry, you know, for this whole situation. As I said, I'm not a bad person, you know, I've grown a lot from this whole deal. Prison has taught me a lot. I would just ask the Court to, you know, think about it or whatever the case may be to give me a lighter sentence so that I may be with my family one day again. That's it. Thank you.

THE COURT: Thank you. All right, Mr. Casey.

MR. CASEY: Your Honor, as we argued the other day in the Jones case, we think that the guidelines are appropriate in all of these cases for -- and I don't want to belabor those arguments, and I think we're beyond that because of the Jones sentence -- and I think it's appropriate for the Court, in light of that sentence, to sentence Mr. Young to a

sentence below what Mr. Jones received because of the relative parity among the four co-Defendants in this case.

And because of the Booker case, you have substantial discretion to determine what that number is. The only thing I would say, in terms of relative culpability, is, in all candor, the unanimous view of the prosecution team in this case was that Mr. Jones was the most culpable followed by Mr. Dowdy, and then Mr. Young being the third most culpable, and then following that, Mr. Jackson.

And the reason for that, and this is complicated, in the sense that it involves a lot of testimony and accumulated evidence. But, basically, if we look at the roles of the four of them, clearly, Mr. Jones was the leader of the conspiracy. He was the one who spent the most time in New York, he was the one that directed the activities of the others. The amount of cash found on him at the time, $3,240, is consistent with his role as the one who took the most profits out of the business.

Then, we go to Mr. Dowdy. Mr. Dowdy was probably, my judgment, the key lieutenant, so to speak, for Mr. Jones. He was the one most involved with operating the conspiracy here in Pennsylvania. The way the guidelines turned out is, both Mr. Young and Mr. Dowdy ended up being at the same level of guidelines, because we think that both Mr. Young and Mr. Dowdy qualified for a three-level role enhancement. In a sense, the guidelines did not permit the kind of fine distinctions that we can make, at this point, that the Court can make.

I'm only suggesting that if you are to make those fine distinctions, that Mr. Dowdy should receive a larger sentence than Mr. Young. That's up to the Court. The Court heard all of the evidence and the testimony as to the Government. But

the way it turned out, Mr. Young did have a substantial role as a lieutenant, as it were, if that's the proper word, in the conspiracy, but not as significant a role in our judgment as Mr. Dowdy.

Obviously, it's a serious offense. The public harm that resulted from this activity was significant, resulting in the addictions that the jury heard from from the people who had gotten addicted to crack, and Mr. Young had a role in that, a substantial role, and I think the Court can fix a sentence that's appropriate. I just wanted to point out that that's the way the Government views the case, in any event, after all of the investigation, the trial, the sentencing transcripts and everything having been reviewed.

THE COURT: Okay. I appreciate the Government's realistic approach, in light of what the Courts are confronted with in these remands for sentencings since the Booker case.

You might enlighten me because, originally, under the guidelines, this Defendant was ear-marked for a life sentence because of the amount of drugs that were attributed to him.

MR. CASEY: Correct.

THE COURT: The Government changed its position and we had an addendum, which provided a range of sentence short of life, and, of course, one was imposed short of life in this case. Do you know why that distinction existed in his case, as opposed to the others?

MR. CASEY: Judge, the quantity distributed by the conspiracy was the quantity. I mean, all of them were going to be subjected to the same quantity, the question was, did we choose to seek to prove the higher quantity, which would have resulted in life sentences.

THE COURT: You reduced the quantity in his case?

MR. CASEY: Yes, as was the case in the other two, as well, Dowdy and Jones. The reason we did that is, obviously, the life sentence is a severe sentence, and that was a consideration, but also the fact was that we were concerned that the quantity hold up, that it be supported by sufficient indicia of reliability, in terms of the Third Circuit case law, and we felt that the more conservative approach was to attempt to prove, which I think we did, and I know we did, between 500 grams and 1 1/2 kilos. I don't think that the fine distinction that I made earlier was in reference to the quantity, so much as it was with respect to the role.

I think that Mr. Jones, Mr. Dowdy and Mr. Young should all be held accountable for the same quantity, but if there is a distinction here among the four Defendants, I think it would be in the role, and that's -- the role enhancement guideline, at least, to me, didn't seem to provide the same kind of flexibility that I'm suggesting you could use today.

THE COURT: All right, is there anything that you want to respond to that was said by counsel for the Government?

MR. O'BRIEN: No, Your Honor.

THE COURT: I have a tendency to agree with the position the Government has been taking in these cases, only because I was not uncomfortable with the Sentencing Guidelines. Unlike the State Court, where a Judge has more discretion under the guidelines, the negative aspect to the guidelines in Federal Court was that the Court had little or no discretion, unless it was discretion that was allowed, pursuant to terms under the guidelines, themselves.

Granted, that the guidelines were very harsh when we're dealing with crack cocaine, but that's what was intended by Congress, and I don't think that the Judges have a right to legislate, whether we agree or disagree, because that is basically not cur role. But under Booker, because the guidelines are now advisory, they are, nevertheless, required to be considered by the Court, even under Section 3553(a), that's one of the things of all of the elements that are indicated in that statute, we are obligated by that legislation to give serious consideration to the guidelines in fashioning a sentence.

But 3553 gives us more freedom in the sentence that we can fashion, and counsel for the Government has received some signal as to what we're going to do in these cases that are coming up as a result of prosecution in this case, because we have taken a position and offered our reasons in the case of Bernard Jones earlier this week or last week when he was sentenced.

In this case, it's true, the Defendant had no criminal history, yet, he initially faced a life sentence, because of the nature of the drug that was implicated in charging him, and we still take into consideration the fact that there were firearms implicated and that he was, as the Government indicates, a manager, along with Bernard Jones and Kevin Dowdy, and did his part was the reason that such a severe sentence was imposed in each of their cases.

When I say severe, I don't mean that it wasn't justified. But now that we have to take into consideration matters which, traditionally, Courts could take into consideration, before we had the stringent guidelines, we do take into account the fact that this Defendant had no prior criminal record, which the guidelines took into consideration, that he had been using drugs since age 15, at least, according to the

Pre-sentence Report, and for years prior to his arrest, he was using cocaine daily. We take into account, which I presume the guidelines feel that they took into account, when they were as stringent as they were, the background of the Defendant.

And I think it's appropriate that we take into consideration the background of the Defendant because he came from nothing. It's not his fault he came from nothing, and it's unfortunate that he didn't have the strength to do something about the fact that he came from nothing more positive to benefit himself. The one thing positive that came from his own hand and thinking is that he has a wife and he has children, presumably, they're still in contact with you.

THE DEFENDANT: Yes, Your Honor.

THE COURT: That is what's important, and it's regrettable that your children are going to be deprived of what you were deprived of as a child and is partly responsible for why you're here. I have been talking only in the context of trying to let it be clear that, in achieving parity, post-Booker, I've taken into account the sentences that we have imposed and the re-sentencing in the case of Bernard Jones, and as the Government has indicated, it's appropriate that this Defendant's conduct is less severe than that of Bernard Jones, and we'll impose a sentence commensurate and establishing, I believe, parity with that sentence and those that are to follow this Defendant. Still, the Judgment of the Court is severe but less severe than it has been.

So that pursuant to the Sentencing Reform Act, it is the Judgment of the Court that the Defendant is committed to the custody of the Bureau of Prisons to be imprisoned for a term of 210 months. This term consists of 210 months on each of counts 1, 4, 7 and 10 all to be served concurrently.

He doesn't have the ability to' pay a fine, but he's obliged to pay an assessment of $100 on each count, if it hasn't previously been paid.

Upon your release, you're going to be placed on supervised release for a term of five years, and this consists of five years on count 1 and 3 years on each of counts 4, 7 and 10 all to run concurrently. Within 72 hours of your release, you'll report to the Probation Office in the District to which you are released.

While on supervised release, the Defendant shall not commit another Federal, State or local crime and shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions:

You'll have to submit to a drug test within 15 days of your release from custody and at least two periodic tests thereafter. You're to cooperate in the collection of a DNA, as directed by the Probation Officer, and I'm not sure that that was a condition at the time of the last sentence, so that's something new. And the sentence imposed in this case, I believe, satisfies the purposes of 18 USC, 3553(a), which outlines the elements that the Court should consider in fashioning a just sentence.

Without transgressing what Congress intended, but exercising greater discretion than allowed, I think this is an appropriate sentence.

And I must advise you, as we did in the past, of your right to appeal this conviction and sentence to the United States Court of Appeals, and if you're unable to pay costs of an appeal, you may apply for leave to appeal in forma pauperis, and if approved, counsel will be appointed for you and you'll not be required to pay any costs. To that extent, I

know you're not happy or any happier, but the point is, I hope that you are successful in the rehabilitation that your counsel alluded to. He's at Otisville and I presume he will continue at Otisville.

MR. CASEY: Thank you, Your Honor.

(At this time the proceedings were adjourned.)

APPENDIX B

UNITED STATES OF AMERICA v. SHERROD YOUNG, Appellant

Case No.: 05-5032

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2007 U.S. App. LEXIS 2641

December 14, 2006, Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 6, 2007, Filed

COUNSEL: For UNITED STATES OF AMERICA, Appellee: Theodore B. Smith, III, Office of United States Attorney, Harrisburg, PA.

For SHERROD YOUNG, Appellant: Joseph A. O'Brien, Oliver, Price & Rhodes, Clarks Summit, PA.

JUDGES: Before: SMITH and ROTH, Circuit Judges, and YOHN, District Judge. *

> * The Honorable William H. Yohn Jr., Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION BY: YOHN

OPINION: YOHN, *District Judge*.

On February 10, 2003, a jury found Sherrod Young guilty of one count of conspiracy to distribute and possess with intent to distribute in excess of 50 grams of crack cocaine in violation of *21 U.S.C. § 846*, and three counts of distribution and possession with the intent to distribute crack cocaine in violation of *21 U.S.C. § 841(a)(1)*. Young's presentence report initially held him accountable for 1.5 kilograms or more of crack cocaine.[1] Subsequently, the government agreed the readily provable drug quantity was between 500 grams to 1.5 kilograms.[2]

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[1] This amount yielded a base Offense Level of 38. Young's presentence report added two-level firearm and three-level managerial enhancements for a total Offense Level of 43. The resulting guideline sentence was life imprisonment.

[2] The second addendum to Young's presentence report incorporated this reduction and stated a total Offense Level of 41, yielding a sentence range of 324 to 405 months.

On May 6, 2004, the first day of Young's sentencing hearing, the government called FBI Agent Kevin Wevodau, who had interviewed people involved in the conspiracy, in order to establish an estimate of the drug quantity attributable to Young. Agent Wevodau testified that Melissa Lynn Martin, a co-defendant, stated that she made at least eight to ten trips with Young and Kevin Dowdy, another co-defendant, to New York to purchase about 60 grams of crack cocaine per trip.[3] Evaluating Agent Wevodau's testimony regarding his conversation with Martin alone, the District Court stated, "I'm fairly satisfied that, by the most conservative estimate, that we have at least 598 grams of crack cocaine."[4] On May 11, 2004, the second day of Young's sen-

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[3] Agent Wevodau also spoke to Dawn Phillips, Carl Laserre, Michelle Kowalski, Vince McHenry and Rosemary Lewis about trips they made with Young and Dowdy and, in some cases, also with Bernard Jones, another co-defendant, to New York to purchase crack cocaine. Agent Wevodau testified to the following. Phillips made six trips with Dowdy and Young during the spring to summer of 2001, purchasing 80 to 180 grams per trip. Laserre recounted four or five trips in mid-2001 with Dowdy, Jones and Young for purchases in the amount of two to three thousand dollars, or about 100 grams, per trip. Kowalski made two trips in summer of 2001 with Dowdy or Young for a baseball-sized quantity, or about 50 grams, per trip. Lewis acknowledged at least two trips with Dowdy and Young for an unspecified quantity. McHenry stated he made five trips with Dowdy and Young for an unspecified quantity.

[4] At the conclusion of the first part of Young's sentencing hearing, the District Court asked both parties to submit estimates of drug quantity attributable to Young. The government's estimate, submitted to the District Court on May 11, 2004, "involved at least 1,460 grams of crack cocaine." Young's brief contends, without pointing to a source, "[o]n May 11, 2004, prior to the sentencing hearing, the United States stated that the maximum amount of crack attributable to Young was 150 grams to 500 grams." This statement by Young is contrary to the government's submitted estimate and to the record, which does not reflect a departure from the government's allegation that the readily provable quantity of 500 grams to 1.5 kilograms contained in the second addendum to Young's presentence report was correct.

tencing hearing, the District Court concluded that "there is sufficient indicia of reliability to support the amount of drugs that the Government wishes to attribute to this Defendant by conservative estimates." The District Court sentenced Young to 324 months of imprisonment. Young appealed.

We affirmed his conviction, but vacated his sentence and remanded for resentencing in accordance with the Supreme Court's intervening decision in *United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). United States v. Young, 149 Fed. Appx. 107 (3d Cir. 2005)* (unpublished). At Young's resentencing hearing held on November 2, 2005, Young's counsel argued for a "substantially" reduced sentence based, in part, on the disparity between crack and powder cocaine penalties in the sentencing guidelines. The District Court responded:

> Granted, that the guidelines were very harsh when we're dealing with crack cocaine, but that's what was intended by Congress, and I don't think that the Judges have a right to legislate, whether we agree or disagree, because that is basically not our role. But under *Booker*, because the guidelines are now advisory, they are, nevertheless, required to be considered by the Court, even under [*18 U.S.C. §] 3553(a)*, that's one of the things of all the elements that are indicated in that statute, we are obligated by that legislation to give serious consideration to the guidelines in fashioning a sentence.

(App. 43A.) On remand, the District Court imposed a sentence of 210 months of imprisonment. This timely appeal followed.

The District Court had jurisdiction pursuant to *18 U.S.C. § 3231*. We exercise jurisdiction over this appeal pursuant to *28 U.S.C. § 1291* and *18 U.S.C. § 3742(a)*. *See United States v. Cooper, 437 F.3d 324, 327-28 (3d Cir. 2006)*.

Young makes two arguments on appeal. First, he contends that his sentence is too severe, or "greater than necessary," because it was the result of an unreasonable disparity between the penalties for crack cocaine and powder cocaine under the sentencing guidelines.[5] He states that if his case had involved powder cocaine, the quantity attributable to him would have yielded a total Offense Level of 31 and a minimum of 108 months. Young also complains that the evidence as to the quantity of crack cocaine was not reliable for several reasons. First, Agent Wevodau's testimony contained hearsay and the credibility of Agent Wevodau's interview subjects was dubious. Second, only two of the individuals interviewed by Agent Wevodau - Martin and Kowalski - testified at Young's trial, and their trial testimonies did not involve drug quantities attributable to Young.

Young's contention that his sentence is unreasonable because the sentencing guidelines' crack/powder cocaine disparity made his sentence too severe is without merit. Before *Booker*, we routinely upheld the disparity against constitutional attack, including equal protection, cruel and unusual punishment, and vagueness claims. *See, e.g. United States v. Frazier, 981 F.2d 92, 95-96 (3d Cir. 1992)*; *United States v.*

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[5] *21 U.S.C. § 841(b)(1)* contains drastically different punishments for crack and powder cocaine, requiring one hundred times more powder cocaine than crack cocaine to trigger inclusion in a particular sentencing range. *Id.* The United States Sentencing Commission adopted this sentencing disparity in the federal Sentencing Guidelines. *See U.S. Sentencing Guidelines Manual § 2D1.1(c)* (2006).

Jones, 979 F.2d 317, 320 (3d Cir. 1992), superseded by statute as stated in United States v. Roberson, 194 F.3d 408, 417 (3d Cir. 1999). After *Booker*, we addressed the issue of whether it is legal error for a District Court to believe that it had no discretion to impose a below-guidelines sentence on the basis of the crack/powder cocaine disparity. *United States v. Gunter, 462 F.3d 237, 244 (3d Cir. 2006).* In *Gunter*, we held that [HN2] "district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process." *Id. at 249.*

In this case, the District Court correctly applied our post-*Booker* sentencing process, which includes calculating a defendant's guidelines sentence in the same manner as it would have before *Booker. See Gunter, 462 F.3d at 247* (citing *United States v. King, 454 F.3d 187, 196 (3d Cir. 2006)* and *Cooper, 437 F.3d at 330*). The District Court also did not suggest that applying the guidelines' penalties for crack cocaine was mandatory, rather it stated "the guidelines are now advisory." Thus, it reduced Young's pre-*Booker* sentence of 324 months, when the guidelines were mandatory, to 210 months under the post-*Booker* advisory regimen. The District Court's apparent consideration and application of the current statutory crack/powder cocaine ratio was an appropriate exercise of its discretion pursuant to *§ 3553(a). See Gunter, 462 F.3d at 247* (citing *King, 454 F.3d at 194*). Honoring Young's request of an even lower sentence based on a more "justified" ratio would have flouted Congress' intent embodied in *§ 841* and the Commission's incorporation of this intent in the sentencing guidelines.[6] *See Gunter, 462*

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[6] In *Gunter*, we summarized the three instances where the Commission has urged Congress to modify federal cocaine sentencing policy by reducing the crack/powder cocaine ratio. *462 F.3d at 239-44*. Each time, Congress has declined to reform the ratio. *Id.*

F.3d at 247 ("[F]ederal courts of appeal have unanimously held that . . . sentencing courts may not craft their own ratio as a substitute for the 100:1 ratio chosen by Congress.").

Young's argument that his sentence is unreasonable also overlooks the District Court's additional consideration of his background, including his history of drug use, his family situation, and his lack of criminal record, as well as the goal of achieving parity among his co-defendants. The District Court took into account the firearm and leadership role enhancements, and imposed a sentence 114 months below the minimum guidelines range. Thus, we find that the District Court's consideration and application of the crack/powder cocaine ratio did not render Young's sentence unreasonable.

Young's second argument that the District Court erroneously found that 500 grams to 1.5 kilograms of crack cocaine were attributable to him is also unpersuasive. [HN3] The standard of proof for sentencing facts under the sentencing guidelines remains preponderance of the evidence. *Cooper, 437 F.3d at 330.* We review the District Court's findings of fact on the issue of drug quantity for clear error. *United States v. Miele, 989 F.2d 659, 663 (3d Cir. 1993).* Before *Booker*, we held that [HN4] using hearsay for sentencing purposes does not violate the Sentencing Reform Act. *United States v. Brothers, 75 F.3d 845, 848 (3d Cir. 1996).* "The sentencing court can give a high level of credence to hearsay statements, going so far as to 'credit hearsay evidence over sworn testimony, especially where there is other evidence to corroborate the inconsistent hearsay statement.'" *Id.* (quoting *Miele, 989 F.2d at 664*). Further, *Booker* does not provide a basis for holding hearsay inadmissible at sentencing, especially as the Supreme Court did not invalidate *18 U.S.C. §*

3661.[7] *Booker, 543 U.S. at 259* (stating that "with [*18 U.S.C. §§ 3553(b)(1)* and *3742(e)*] excised, . . . the remainder of the Act satisfies the Court's constitutional requirements"). The sentencing guidelines also permit a District Court to consider "relevant information without regard to its admissibility under the rules of evidence applicable to trial." *U.S. Sentencing Guidelines Manual § 6A1.3(a).* This includes reliable hearsay. *Id.* at cmt. (citing *§ 3661*). However, [HN5] both our precedent and the sentencing guidelines require that a sentencing fact have "sufficient indicia of reliability to support its probable accuracy." *Brothers, 75 F.3d at 848* (internal quotations omitted); *see also § 6A1.3(a).* We have directed District Courts to apply the sufficient indicia of reliability standard "rigorously," *Miele, 989 F.2d at 664*, but have also recognized that "in calculating the amount of drugs involved in a particular operation, a degree of estimation is sometimes necessary." *United States v. Paulino, 996 F.2d 1541, 1545 (3d Cir. 1993).*

In this case, the District Court determined by a preponderance of the evidence that Young was responsible for 500 grams to 1.5 kilograms of crack cocaine. The District Court found sufficient indicia of reliability to support this amount of drugs, even by highly conservative estimates, based on "a lot of testimony, over a period of time" and on the fact that "much of the evidence was alluded to at the trial." Even though Young asserts that only two out of the six individuals interviewed by Agent Wevodau testified at his trial, the District Court found these trial witnesses' exposure to cross examination was an "important factor" in its consid-

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[7] *18 U.S.C. § 3661* states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *§ 3661.*

eration of the evidence on the issue of drug quantity in Young's sentencing hearing. In addition to the trial record, the District Court had at its disposal the testimony of Agent Wevodau, which was notably specific both in the number and timing of the trips individuals involved in the conspiracy took with Young and in the quantity of drugs purchased during these trips,[8] and extensive argument from the government's and Young's attorneys during Young's sentencing and resentencing hearings. Thus, the record clearly supports the District Court's finding that 500 grams to 1.5 kilograms were attributable to Young. Accordingly, the District Court did not commit clear error, and we will affirm the District Court's judgment of sentence.

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[8] *See supra* note 3.

APPENDIX C

PART D - OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

. . .

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) • 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); • 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • 1.5 KG or more of Cocaine Base; • 30 KG or more of PCP, or 3 KG or more of PCP (actual); • 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; • 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); • 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); • 12 KG or more of Fentanyl; • 3 KG or more of a Fentanyl Analogue; • 30,000 KG or more of Marihuana; • 6,000 KG or more of Hashish; • 600 KG or more of Hashish Oil; • 30,000,000 units or more of Schedule I or II Depressants; • 1,875,000 units or more of Flunitrazepam.	Level 38

(2)	• At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); • At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • At least 500 G but less than 1.5 KG of Cocaine Base; • At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); • At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; • At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); • At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); • At least 4 KG but less than 12 KG of Fentanyl; • At least 1 KG but less than 3 KG of a Fentanyl Analogue; • At least 10,000 KG but less than 30,000 KG of Marihuana; • At least 2,000 KG but less than 6,000 KG of Hashish; • At least 200 KG but less than 600	**Level 36**

KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3) **Level 34**

- At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 1.2 KG but less than 4 KG of Fentanyl;

- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) - At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — **Level 32**
- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Am-

phetamine (actual);

- At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5)

- At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);

LEVEL 30

- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6) • At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 28**

- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 20 G but less than 35 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;

- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) **Level 26**

- At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80

KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8)
- At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 4 G but less than 5 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 32 G but less than 40 G of

Level 24

	Fentanyl; • At least 8 G but less than 10 G of a Fentanyl Analogue; • At least 80 KG but less than 100 KG of Marihuana; • At least 16 KG but less than 20 KG of Hashish; • At least 1.6 KG but less than 2 KG of Hashish Oil; • At least 80,000 but less than 100,000 units of Schedule I or II Depressants; • At least 5,000 but less than 6,250 units of Flunitrazepam.	
(9)	• At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); • At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • At least 3 G but less than 4 G of Cocaine Base; • At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual); • At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice"; • At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);	**Level 22**

- At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10) - At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — **Level 20**
- At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 2 G but less than 3 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G

but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- 40,000 or more units of Schedule III substances;
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11)
- At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 1 G but less than 2 G of Cocaine Base;

Level 18

- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances;
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12)	• At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); • At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • At least 500 MG but less than 1 G of Cocaine Base; • At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual); • At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice"; • At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual); • At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); • At least 4 G but less than 8 G of Fentanyl; • At least 1 G but less than 2 G of a Fentanyl Analogue; • At least 10 KG but less than 20 KG of Marihuana; • At least 2 KG but less than 5 KG of Hashish; • At least 200 G but less than 500 G of Hashish Oil; • At least 10,000 but less than	**Level 16**

20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III substances;
- At least 625 but less than 1,250 units of Flunitrazepam.

(13)
- At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 250 MG but less than 500 MG of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 2 G but less than 4 G of Fentanyl;

Level 14

- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances;
- At least 312 but less than 625 units of Flunitrazepam.

(14) • Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 12**
- Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- Less than 250 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances;
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15)
- At least 1 KG but less than 2.5 KG of Marihuana;
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III substances;
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

Level 10

(16) • At least 250 G but less than 1 KG of Marihuana; **Level 8**
• At least 50 G but less than 200 G of Hashish;
• At least 5 G but less than 20 G of Hashish Oil;
• At least 250 but less than 1,000 units of Schedule I or II Depressants;
• At least 250 but less than 1,000 units of Schedule III substances;
• Less than 62 units of Flunitrazepam;
• At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
• 40,000 or more units of Schedule V substances.

(17) • Less than 250 G of Marihuana; **Level 6**
• Less than 50 G of Hashish;
• Less than 5 G of Hashish Oil;
• Less than 250 units of Schedule I or II Depressants;
• Less than 250 units of Schedule III substances;
• Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
• Less than 40,000 units of Schedule V substances.

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No. 06-1474

In the Supreme Court of the United States

SHERROD YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 06-1474

SHERROD YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the procedures applied in the determination of his sentence are not in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of sentencing procedure under *Booker*. Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of *Claiborne* and *Rita*, the petition should be held pending the decisions in those cases, and then disposed of as appropriate in light of those decisions.*

* The government waives any further response to the petition unless this Court requests otherwise.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2007

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No. 06-1474

IN THE
Supreme Court of the United States

SHERROD YOUNG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

On June 11, 2007, the Court granted review in *Kimbrough v. United States*, No. 06-6330, a case presenting virtually identical questions to those raised by the petition. Accordingly, the Court should hold the petition pending its decision in *Kimbrough*. If the Court grants plenary review, it should consolidate the cases for argument.

Respectfully submitted,

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(3)

No. 06-1474

IN THE

Supreme Court of the United States

SHERROD YOUNG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

Although the Government suggests that the Court should hold the petition pending its decisions in *Claiborne v. United States* No., 06-5618,[1] and *Rita v. United States*, 06-5754, the Government offers no basis for denying immediate plenary review of the question presented. In seeking rehearing and rehearing *en banc* before the D.C. Circuit, the Government recently argued that the question presented in this petition constitutes "an issue of exceptional importance." Pet. for Reh'g at 6, *United States v. Pickett*, No. 05-3179 (D.C. Cir. filed Apr. 30, 2007). The D.C. Circuit's unanimous denial of rehearing and rehearing *en banc* cements the split among the circuits on this issue. *See Pickett*, No. 05-3179 (D.C. Cir. filed May 21, 2007) (orders denying rehearing and rehearing *en banc*) (App. 1a-2a). There is therefore an even stronger case for plenary review now than there was when Mr. Young filed the petition.

There is no need or justification for further percolation of the question presented. The ten courts of appeals to address the question have reached fundamentally conflicting conclusions. Thousands of sentencing cases are presently subjected to the competing and confused interpretations of those courts. The Court's resolution of the question presented is therefore not only warranted but essential.

The Government also effectively concedes that this case presents the Court with an ideal vehicle to provide lower federal courts with much needed guidance on the question presented. The decision below holds that district courts lack authority to deviate from Guidelines-range sentences for crimes involving crack cocaine on the basis of the

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[1] Earlier today, the Court vacated as moot the Eighth Circuit's decision in *Claiborne*. (App. 3a.) That dismissal does not change the fact that the recurring question the petition presents has fundamentally divided the lower courts and warrants plenary review.

crack/powder sentencing disparity even when those sentences are "greater than necessary" to achieve the sentencing goals of 18 U.S.C. § 3553(a). The petition thus cleanly presents this question of exceptional importance.

Because the Government "waives any further response to the petition," Opp. 1 n. *, the Court should grant the petition. At the very least, and as the Government concedes, the Court should hold the petition pending its decision in *Rita*.

Respectfully submitted,

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Counsel for
Petitioner Sherrod Young

June 4, 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3179		**September Term, 2006**
UNITED STATES OF AMERICA,	)	
Appellee	)	01cr00181-01
vs.	)	Filed on: May 21, 2007
LORENZO PICKETT,	)	
Appellant	)	

BEFORE: GINSBURG, Chief Judge, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

BY: _____
Michael C. McGrail
Deputy Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3179 **September Term, 2006**

UNITED STATES OF AMERICA,	)	
Appellee	)	01cr00181-01
vs.	)	Filed on: May 21, 2007
LORENZO PICKETT,	)	
Appellant	)	

BEFORE: GINSBURG, Chief Judge, and RANDOLPH and ROGERS Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed April 30, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

BY: _____
Michael C. McGrail
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 06-5618

MARIO CLAIBORNE, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 4, 2007]

PER CURIAM.

The Court is advised that the petitioner died in St. Louis, Missouri, on May 30, 2007. The judgment of the United States Court of Appeals for the Eighth Circuit is therefore vacated as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

It is so ordered.